UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES A. HICKENLOOPER,

Appellant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED, a corporation, and W. J. D'ARCY, Receiver of the said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED, a Corporation,

Appellees.

BRIEF FOR APPELLANT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO

J. D. SKEEN,

Solicitor for Appellant, Salt Lake City, Utah.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES A. HICKENLOOPER,

Appellant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED, a corporation, and W. J. D'ARCY, Receiver of the said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED, a Corporation,

Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This suit was instituted in the Circuit court of the United States for the District of Idaho by the appellant, a resident of the state of Utah, against the appellees, all residents of the state of Idaho. The jurisdiction is based upon diverse citizenship. The following facts, except as indicated, are admitted by the pleadings and the evidence. (Tr. 1.)

On the 8th day of July, 1907, one Thomas G.

Clegg executed and delivered to one S. J. Rich his promissory note for Fourteen Hundred Dollars ($1400.00), to secure payment of which he and his wife executed and delivered a first mortgage upon about Three Hundred (300) acres of land located in Bingham County, state of Idaho, which the said Clegg then owned. (Tr. 3)

On the 25th day of September, 1908, Clegg and his wife sold and conveyed said real estate, subject to the Rich mortage, to The Crystal Springs Investment Company, a corporation, and on the same day took back a promissory note for $2080.00 secured by a second mortgage covering the same real estate. (Tr. 3.)

On the 26th day of October, 1908, Clegg assigned the second mortgage to the Brown-Hart Company, a corporation, as collateral to secure the payment of an indebtedness from him to it, and on the 23rd day of Februay, 1909, Clegg made a second assignment of the second mortgage to T. H. Christy to secure payment of an indebtedness from Clegg to First National Bank of Blackfoot, Idaho. Christy was cashier of the bank and took the second assignment of the second mortgage for the benefit of the bank, and on the 20th day of April, 1910, Christy took an assignment from the Brown-Hart Company of all its interest in the second mortgage for collection. (Tr. 4, 121).

Payment of the principal and interest on the

first mortgage was not made and early in the year of 1908 Rich instituted proceedings to foreclose the first mortgage. Judgment was taken for $1811.60, the property sold by the Sheriff for Bingham County, Idaho, and a certificate of sale issued, which, under the law of Idaho, entitled the holder to a Sheriff's deed on the 30th day of June, 1909, which deed would, of course, cut off all equities of the mortgagor and subsequent lien claimants. (Tr. 5).

Appellant was the owner of stock in a corporation known as the Clegg-Hickenlooper Ranch Company, which had transferred its assets to the Crystal Springs Investment Company, and under the terms of the transfer appellant was entitled to 12,000 shares of stock in The Crystal Springs Investment Company. He was also interested in a corporation known as the Interstate Realty Company, which in turn held stock in The Crystal Springs Investment Company. (Tr. 70).

On the 28th day of June, 1909, two days before the certificate matured, the receiver filed his petition in the District Court for Bingham County, Idaho, by which he was appointed receiver, reciting his appointment and qualification, and further showing to the court that the certificate of sale, issued at the foreclosure of the first mortgage, would mature on the 30th day of June; that the property was worth a sum greatly in excess of the amount of the judgment,

and prayed for authority to borrow $2500.00 to be used in taking up the certificate of sale and protecting the equity in the property. The petition is attached to the bill as "Exhibit D."

On the 9th day of July, nine days after the certificate would have matured, the court made and entered its order authorizing the receiver to borrow the sum of $2500.00 and secure the repayment of it with a mortgage upon the property described in the bill. The order is attached to the bill as "Exhibit E." (Tr. 22.)

On the 29th day of June, 1909, one day before the certificate of sale matured, because of his interest as a stockholder and at the instance of the receiver of The Crystal Springs Investment Company (Tr. 95), appellant went from Ogden, Utah, to Blackfoot, Idaho, and called on the receiver. (Tr. 63.) Appellant testified that the receiver asked him if he could not take care of the first mortgage. The receiver denied that he made such a request and asserted that appellant proffered to take care of the first mortgage. (Tr. 41, 143). Appellant testified that he replied to the receiver that he thought he could take care of the first mortgage provided he could he protected, but that he would not be interested at all unless the security that was given him would be prior to the mortgage held by Christy and the Brown-Hart Company. (Tr. 63).

The appellant and the receiver then called on Christy at the First National Bank, Blackfoot, Idaho, and Christy stated to them in response to questions asked that he was not going to do anything to protect the property against the certificate of sale; that "he was going to let it go." Appellant then asked him if they would allow his mortgage, that is a mortgage which he was to receive to secure money he thought of advancing to protect the property, to become a first mortgage if he (appellant) protected the property, and Christy replied that he thought it could be arranged, provided the Brown-Hart people, who had the first assignment of the second mortgage, consented, and advised appellant and the receiver to see the Brown-Hart people. (Tr. 60). Appellant and the receiver then called on Hart, of the Brown-Hart Company, and were told by Mr. Hart that he thought it could be arranged if Christy was willing (Tr. 60).

Hart testified that he had a conversation with Hickenlooper and told him that he would have to see Mr. Jones (John W. Jones), their attorney, before he could give him any answer to the proposition. (Tr. 114).

The receiver testified that he did not recall either of the conversations with Christy, with the Brown-Hart people or with appellant. (Tr. 139-140.)

Christy testified that the appellant and the receiver called on him and requested that they release the Clegg mortgage so that the appellant could have first lien on the real estate to secure payment of the money, which he thought of advancing to protect the property against the maturity of the certificate of sale, and he replied that if they would go to John W. Jones, attorney for the Brown-Hart Company, and secure his recommendation on behalf of the Brown-Hart Company, that he would consent. He further testified that about three hours later Mr. Hart and Mr. Clegg called at the bank and stated that the Rich judgment had been fully paid and that he replied, "In that event the lien that we now hold will stay just as it is." (Tr. 123.)

Neither of the assignees of the second mortgage did anything whatever to protect their interests and both indicated to appellant that they would not, and that they regarded what security they may have had in the second mortgage as lost through the foreclosure proceedings. (Tr. 60, 63, 95 and 117.)

After these various conversations appelant left Blackfoot for Ogden on the mid-night train of June 29th, 1909, and on the following day arranged with the Pingree National Bank, of Ogden Utah, for money with which to redeem the property from the sale on the foreclosure of the first mortgage, and about fifteen minutes before five o'clock p. m. of

June 30, at the instance of appellant, James Pingree, cashier of the Pingree National Bank of Ogden, telephoned to D. R. Jones, cashier of the Blackfoot State Bank of Blackfoot, Idaho, and in the presence of appellant told Mr. Jones to pay to the receiver $2050.00 upon receipt of a first mortgage upon the real estate described in the bill. (Tr. 63.)

At the conclusion of the conversation between the cashiers of the two banks, the cashier of the Blackfoot State Bank turned to the receiver and one Walker, whom appellant had requested to look after his interests in the matter, and said, "It is alright, the money is here," and requested the receiver to make out a certificate of deposit for the amount telephoned and to draw his check against the account for the statisfaction of the judgment. The receiver, John W. Jones, who was acting as attorney for the receiver and at the same time as attorney for Brown-Hart Company, and the witness Walker, who was acting for appellant, all went to the Sheriff's office five minutes before the office closed and the certificate matured, and redeemed the property from the sale with the money which appellant had telephoned to the bank. Walker then requested John W. Jones to give him a suitable mortgage to secure the repayment of the money to appellant. Jones stated that the matter was somewhat complicated and he was not then in a position to do so, but that he would

look after it later. He further stated that there would be a filing fee which he did not feel disposed to advance. Walker gave him the filing fee and left. (Tr. 98.)

No mortgage was executed and filed and appellant being anxious about his security returned to Blackfoot about ten days later and called on the receiver, who referred him to John W. Jones, his attorney, but he got no satisfaction from either of them. (Tr. 72.)

During all these transactions The Crystal Springs Investment Company was wholly insolvent and after the 13th day of April, 1909, was in the hands of a receiver.

After the payment of the money, proceedings were instituted in the District Court for Bingham County, Idaho, to foreclose the second mortgage as a first mortgage upon the property. Appellant was not made a party to the suit. Judgment was entered and the property sold under execution to T. H. Christy for the sum of $2770.00. (Tr. 148.) Appellant prayed for judgment for the money advanced and to secure payment of the judgment that he be subrogated to all the rights of the first mortgagee; that the first mortgage be reinstated and foreclosed for his benefit. (Tr. 9.)

The case was submitted to the court upon testimony taken before a special examiner and upon oral

argument on the 8th day of July, 1911, and the court entered judgment dismissing the bill with costs to defendants, from which judgment appellant appeals and assigns the following errors: (Tr. 152.)

ASSIGNMENT OF ERRORS.

1. The court erred in refusing to enter judgment against the defendants and in favor of the complainants for the sum of $2,012.76, with interest as demanded in the bill of complaint.

2. The court erred in refusing to subrogate complainant to all of the rights of the said S. J. Rich under the note and mortgage attached as Exhibits "A" and "B" to the bill of complaint, and to reinstate and foreclose said mortgage to satisfy the judgment in favor of the said complainant.

3. The court erred in denying complainant a prior lien upon the real estate described in the bill of complaint to secure payment of the money advanced by him for the purpose of protecting the title to said property from the maturity of the certificate of sale referred to in the bill of complaint.

4. The court erred in rendering judgment against the complainant and in favor of the defendants, dismissing the complainants' bill of complaint and rendering judgment in favor of the defendants for costs.

ARGUMENT.

We think the record presents four sufficient reasons for reversing the judgment of the lower court and granting the relief prayed.

I.

The holders of the second mortgage and their attorney took an unfair advantage and are estopped from claiming priority.

When appellant went to Blackfoot on the 29th day of June, 1909, one day before the certificate matured, he found that the receiver had no money with which to protect the property and neither of the holders of the second mortgage had made any preparation whatever to protect their security. He was interested only as a stockholder and, of course, knew that both the first and second mortgages must be paid in full before he would be entitled to participate as a stockholder. There is nothing in the record justifying the assumption that he was seeking to induce the holders of the second mortgage to protect his interests or to escape on behalf of the corporation the payment of the second mortgage. The situation was such that it was necessary to take care of the first mortgage and to secure additional time to en-

able the corporation to rehabilitate itself and pay the second mortgage.

At the instance of the receiver appellant and the receiver called on the holders of the second mortgage and learned from them that they did not propose to protect their interests. .(Tr. 63.) there is a slight conflict in the testimony as to just what assurances the holders of the second mortgage gave appellant that they would consent that he should have a first lien upon the property for money advanced to take up the certificate of sale. It is clear, however, that appellant concluded from the conversations that they would consent to such arrangement. (Tr. 66), and it is also clear that the receiver and the holders of the second mortgage all knew that appellant was relying upon the assurances given, was intending to advance the money for the purpose of protecting the property and was expecting a first lien to secure its repayment. They then, perhaps for the first time, saw their opportunity to advance their mortgage to a first lien upon the property. They fully appreciated the confidence appellant had reposed in them, and they likewise appreciated the fact that appelant was confiding in the receiver and their attorney. There was nothing for them to do but to remain silent and trust to the receiver and their attorney to receive and apply the money and to at the same time arrange the priority of the liens on the record.

It is not clear that appellant actually employed John W. Jones to represent him, but it is clear that his confidence in Jones and the receiver and the holders of the second mortgage was such that he employed no other attorney. In this view of the case, it is immaterial whether the various conversations were designedly brought about by the receiver and the holders of the second mortgage or whether they were suggested by appellant. The fact remains that appellant was mislead and deceived by the conversations, if the holders of the second mortgage did not in fact actually promise him the first lien. They at all times knew that appellant was relying upon their assurance and they jointly, as the result of a conspiracy to which both the receiver and his attorney were parties, or severally in their own minds without communication to each other intended to continue the deception and betray appellant's confidence for an advantage.

If such had not been the intent of both Christy and Hart, of the Brown-Hart Company, they would have dismissed the matter from their minds, as neither of them had done anything whatever to protect their security, and both of them had positively asserted that they had no intention whatever of protecting it. Instead, however, Hart actually went to the office of his attorney and remained there during the time their scheme was being consumated by the

payment of the money and was, no doubt, there when Walker demanded security for the money which had just been paid over to the sheriff. The reply of Jones is in all respects consistent with the theory suggested.

Hart immediately left the office and went direct to Christy and informed him that the money had been paid. Christy's reply that they would then insist upon their mortgage as a first lien was but natural in view of their intentions. (Tr. 131.)

Christy then wrote appellant demanding that he pay off the second mortgage also and threatening if he failed to do so to foreclose the second mortgage as a first lein and thereby forfeit the payment made by appellant. (Tr. 76.)

The conduct of John W. Jones in lending himself to the consumation of the scheme, cannot be explained upon any theory consistent with the good faith required at his hands. He was there to receive and pay the money and was in a position to protect all parties and to do exact justice by respecting the confidence reposed in him. He was likewise in a position to perpetrate a gross wrong upon appellant by taking up the certificate and on the record destroying appellant's priority. It is hard to take a mere charitable view of the situation in view of the advantages secured to his local client. They sought a pecuniary advantage by sharp practices and the

betrayal of confidence, which equity ought not to tolerate.

II.

The case calls for the application of the maxim: **"Equity regards and treats that done which in good conscience ought to be done."**

If D. R. Jones, the cashier of the Blackfoot State Bank upon receiving the money telephoned to him by James Pingree, of Ogden, Utah, had followed the instructions given and paid only upon receipt of a first lien upon the property, appellant would have suffered no wrong.

If John W. Jones or the receiver, in paying the money over, had taken an assignment of the certificate of sale, no injustice would heve been done.

If the holders of the second mortgage had done what they assured appellant they were willing to do, there would have been no miscarriage of justice.

The rights of innocent third parties are in no respect involved. The holders of the second mortgage took advantage of the situation, foreclosed their second mortgage as a first lien upon the premises without making appellant a party, and bought the property in on the execution sale for $2,770.00. (Tr. 148.) There is no room to deny the application of

the maxim. To prevent a gross miscarriage of justice the court is called upon to view the situation of the parties as if the certificate of sale had been assigned and the priority continued.

Pomeroy's Equity Jur. 3rd Edition, Sec. 364.

III.

Appellant discharged the first lien at the instance of the receiver and is, therefore, entitled to equitable subrogation.

There is some conflict in the testimony of appellant and the receiver as to whether the receiver asked appellant to advance the money or whether appellant offered to do so. In view of the conduct of the receiver in going with appellant to the holders of the second mortgage and discussing with them the priority of liens and of his various conversations with the witness Walker, his presence at the bank to secure the money and the redemption of the certificate, we think his statement denying that he requested appellant to advance the money should not be seriously considered. Furthermore his failure to remember the important conversations with Hart and Christy casts a suspicion upon his entire testimony. (Tr. 140.) It is clear that appellant was neither a stranger nor a volunteer. What he did

was done with the approval if not at the special request of all concerned.

The rule is stated and applied in the following authorities:

3 Pomeroy's Eq. Jur. 3 Edition Sec. 1211.
Harris on Subrogation Sec. 811 page 559.
Seldon on Subrogation Sec. 245 page 367.

In Tradesmens' Building Association vs. Thompson, 32 N. J. Eq. 133, the court says:

"A person who has lent money to a debtor, may be subrogated by the debtor to the creditor's rights, and if the party who has agreed to advance the money for the purpose employes it himself in paying the debt and discharging the incumbrance on land given for its security, he is not to be regarded as a volunteer. Dixon on Subrogation 165; Payne vs. Hatheway, 3 Vt. 212. The real question in all such cases is, whether the payment made by the stranger was a loan to the debtor through a mere desire to aid him, or whether it was made with the expectation of being substituted in the place of the creditor. If the former is the case, he is not entitled to subrogation; if the latter, he is, Cole vs. N. J. Midland R. R. Company, 4 Stew. 105, 136."

Cumberland Building & L. Assn. vs. Sparks
C. C. A. 111 Fed. 647.

Columbus S. & H. R. Co. Appeals, 109 Fed. 177, 210.

Rachel vs. Smith C. C. A. 101 Fed. 159.

Edwards vs. Davenport, 20 Fed. 756.

Barnes Mott, 64 N. Y. 397, 21 Am. Ry. 625.

IV.

Appellant was interested as a stockholder in The Crystal Springs Investment Company, and as such was authorized to pay the money to protect his interests, and aside from the questions herein above discussed, was entitled to subrogation to the rights of the original mortgagee.

This principal is sustained by the following authorities:

Harris on Subrogation, Sec. 811.

Seldon on Subrogation, 2nd Edition, Sec. 245.

Wright vs. Orville Mining Co. 40 Cal. 20.

Bush vs. Wadsworth, 60 Mich, 255, 27 N. W. 532.

The petition and the order attached to the bill as Exhibits "D" and "E" showed an intention on the part of the receiver to give the best security he had even though the mortgage was not desiginated as the first mortgage. The court had the power to authorize the receiver to borrow the money to protect

the property and to give the best security he had. Such security, of course, could not impair the rights of subsequent lien holders. If the appellant had taken an assignment of the certificate, the rights of the second mortgagee would have been in no respect impared.

Tradesmens' Building Assn. vs. Thompson, 32 N. J. Eq., 133.

Appellant is not therefore, prejudiced by the allegation or by the fact that he in a measure relied upon those proceedings. Neither the testimony in the record nor the conduct of the parties furnished any foundation for a conclusion that appellant was "hoping that those interested in the second mortgage would be willing to postpone their lien, but expecting and relying only upon the mortgage which the receiver was authorized to give under the order of the court referred to," or that he was "willing to extinguish the rights of the purchaser on the foreclosure sale with the understanding that the money advanced by him for that purpose should be secured by a mortgage given by the receiver pursuant to the authority conferred upon him by the order of the court." The evidence is all to the contrary.

It is submitted that the cause should be reversed with directions to grant the relief prayed.

Respectfully submitted,

J. D. SKEEN,

Solicitor for Appellant, Salt Lake City, Utah.